refundable item of expenditure as it was an item of loss following the hijacking.

To that end, I had given judgment to the plaintiff for the sum claimed, interest at 8% pa from 13 March 1981 to date of realization and costs.

Order accordingly.

Solicitors: *Azim Ong & Krishnan*; *Ong Chin Beng & Rakan-Rakan.*

Reported by *PS Ranjan*

Public Prosecutor v Wong Moy

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL TRIAL NO 47 OF 1985
KC VOHRAH J
7 JUNE 1988

Criminal Procedure – Investigations – Unsatisfactory conduct of investigations – Effect on prosecution case

Evidence – Sketch plan – Mistakes in plan – Features from hearsay included – Use of sketch plans in evidence – Onus of proof in criminal law – Rebuttable presumptions – Dangerous Drugs Act 1952, s 37(d) & (da)

The accused was charged under s 39B of the Dangerous Drugs Act 1952 with the offence of trafficking in heroin. The prosecution's case was that she was found, during a police raid at the premises where she rented a room, rushing towards the back portion of the premises and when arrested she had several items in both her hands, including a quantity of heroin. Her defence was that the police had fabricated the prosecution's case against her. According to her, the police had feigned the recovery of certain items from her blouse pocket which one of the police said contained heroin. She also said that the police had recovered from outside the back of the premises a bag which one of them said contained heroin and accused her of being its owner. She also claimed that some other person or persons living in one of the rooms in the house had escaped through the back door of the house when the police raided the house and that the heroin was most probably theirs.

The investigating officer had drawn a sketch plan of the premises which, although sloppily drawn and deficient in several respects, gave a general picture of the layout of the permanent features of the premises. The plan was not drawn to scale. The investigating officer had erased a line drawn to scale. The investigating officer had erased a line of 'x' marks on the plan intended to show the movements of the accused and he said that he had erased them later because he had made a mistake regarding the markings. The investigating officer had gone back to the premises about three months after the raid. Photographs of the premises were taken only four months after the raid. The sketch plan tendered in court had been prepared from an original sketch but the original sketch was not available at the trial. The investigating officer had included features in the plan based on what he had heard from a member of the raiding party who had arrested the accused.

There were various discrepancies in the evidence of the investigating officer and the arresting officer, particularly when considered along with the sketch plan, the photographs, the police report lodged by the investigating officer after the raid, and the evidence tendered by the defence.

Held, acquitting the accused: (1) Features from hearsay should not be shown in a sketch plan. Unfortunately, police witnesses still persist in putting such features in a sketch plan which should only show permanent features visible to them. Courts in admitting such sketch plans as aids to better understanding of the testimony of witnesses allow identification of the additional features unless there are objections from defence counsel.

(2) The investigations in this case were unsatisfactorily conducted. The blemishes in the prosecution's case had become accentuated, and more blemishes had been revealed, in the light of the totality of the evidence. The evidence of certain members of the raiding party with their inherent inconsistencies and their inconsistencies when viewed against the police report, the sketch plan, the evidence of the investigating officer and the defence left the court in a state of doubt as to what actually took place at the time of the raid.

(3) The cardinal principle enshrined in the law of the country is that the onus of proving the guilt of an accused is throughout on the prosecution and if upon the whole evidence the court is left in a real state of doubt, the prosecution had failed to satisfy the onus of proof which is upon it. The accused had succeeded in raising a reasonable doubt on the prosecution's story that she was in possession of the drugs.

(4) In the result the court did not have to consider the rebuttable presumptions raised under s 37(d) and (da) of the Act, namely, that she was deemed to have known the nature of the drugs and that she was deemed to have trafficked in the drugs.

Cases referred to
1 *R* v *Lim Kang Chui* [1949] MLJ 211 (folld)
2 *Mat* v *PP* [1963] MLJ 263 (folld)

Legislation referred to
Dangerous Drugs Act 1952 ss 37 & 39

Ahmad Rosli bin Mohd Sham (Deputy Public Prosecutor) for the prosecution.
Khairuddin bin Suleiman for the accused.

Cur Adv Vult

KC Vohrah J: In this case the accused was charged as follows:

> That you on 5 October 1984 at about 9.30pm, at house No 71, Jalan Berangan, in the federal territory of Kuala Lumpur, did on your own behalf traffick in dangerous drugs, to wit, 29 plastic packets of heroin and 92 straw tubes of heroin weighing a total of 18.62g, in contravention of the provision of para (a) of sub-s (1) of s 39B of the Dangerous Drugs Act 1952, and that you have thereby committed an offence punishable under s 39B(2) of the said Act.

The prosecution's case against the accused is that she was found, during a police raid at No 71, Jalan Berangan, rushing towards the back portion of the premises and when arrested, she had several items in both her hands. In her right hand she held a newspaper package contain-

ing four plastic packets and a small purse containing 24 straw tubes. The four plastic packets and the 24 straw tubes held substances which contained heroin. In her left hand she held a red plastic bag containing a 'glucolin' tin, a weighing scale in a container, two bundles of empty straw tubes and two bundles of empty plastic bags. The 'glucolin' tin contained 25 small plastic packets, ten straw tubes and a large plastic packet containing 58 short straw tubes all of which held substances which contained heroin. The total weight of all the heroin found on her came to 18.62g according to the report of a government chemist.

In view of the nature of the cross-examination directed at the raiding officers, PW4 and PW5, and at the investigating officer of the case, PW1, it would be necessary to have some idea of the arrangement of the rooms, passage way, doors and entrances within the premises. This can be gathered from the description of the premises given by the relevant witnesses as aided by photographs (P28A to E) taken of the outside and the inside of the premises and by the sketch plan (P27) of the place which, although sloppily drawn by PW1 and deficient in several aspects, gives a general picture of the layout of the permanent features of the place.

As one faces the premises one meets with a door with a transparent glass panel (glass door). Beyond the glass door on the right side are four rooms, one after another, in a row. For convenience, I adopt the designation of these rooms marked by the investigating officer (the 'IO') in the sketch plan as B, C, D and E respectively, front to back. On the left as one enters the door is an open space which reaches a wall (dividing wall) which comprises, roughly, a bottom half of solid material and an upper half with glass-paned louvres. Between the right end of this wall and the wall of a room on the right is an entrance. Beyond this wall on the left is another open space which appears to be a dining area. This space is bordered on the right by the wall of room D. Towards the back on the left it reaches a room which is designated F by the IO, and which I adopt. The door to this room had been incorrectly, as admitted by him, marked by the IO in the sketch plan. In actual fact the door to this room faces the front of the premises and opens into the dining area.

Between room F on the left and roughly the last room, room E, is a narrow passage way which leads to an entrance which opens into the back portion of the premises.

At the back of this portion facing this entrance is what appears to be a rectangular concrete structure with an upright and large cylindrically shaped pipe leading into the structure. This structure has been referred to in the evidence as the 'rubbish chute'. To the right of the entrance to the back portion is the kitchen though this cannot be seen in any of the photographs.

I now come to what raiding offiers, PW4 and PW5, did and saw at these premises.

PW4, Inspector Mohd Yusof, raided the premises accompanied by PW5, Detective Corporal Khabri, and three other police personnel on 5 October 1984 at 9.30 pm.

PW4 stated that when he arrived at the premises he found the front door of the premises to be made of glass and he could see clearly the inside as the house was lighted. He knocked at the glass door several times. He saw a woman, the accused, come out from a room on the left, room F, and walk towards the glass door. At that time she was not carrying anything. When she was near the glass door PW4 signalled her to open the door and PW4 said he said 'polis'. The woman, the accused, however, ran towards the back portion of the house. Inspector Mohd Yusof then instructed a detective constable, Mohamad, to break the glass door. The inspector's attention was then directed to the breaking of the glass which took about 30 seconds. When the glass was broken he stepped into the house. Then, according to him, he and PW5, Khabri, gave chase to the accused.

Khabri corroborated what Inspector Mohd Yusof described up to the point where DPC Mohamad started to break the glass door. He said that whilst the glass was being broken he kept observation on the woman after Inspector Yusof had identified himself. He said he saw the woman, the accused, run towards room F which she had earlier come from. He saw her enter the room and then come out from the same house carrying something and run towards the back portion of the premises.

I now come to the next segment of time in regard to the raid.

Inspector Mohd Yusof stated that he entered the house as soon as the glass door was broken. He saw the accused head towards the kitchen. He said he and Khabri managed to arrest the woman at point 'X' in the sketch plan; Khabri held both hands of the accused. It will be noted that 'X' in the sketch plan cannot be seen from the glass door area or from the passage. He said that when Khabri caught hold of her hands she put up a struggle and eventually with the assistance of one Detective Constable Rosli, Khabri managed to handcuff the accused.

Inspector Mohd Yusof said he found a newspaper package and a brown purse in her right hand and a plastic bag in her left hand.

Khabri corroborated Inspector Mohd Yusof's evidence as to the chase, his catching hold of both hands of the accused, the struggle put up by the accused, the discovery of the things in her hands and the handcuffing

of the accused. He confirmed that the arrest was made in the kitchen area.

Then the premises were searched by Inspector Mohd Yusof. According to him and Khabri, nobody else apart from the accused and the police personnel were in the house. PW1 inspected all the rooms B to F except for room E which was padlocked. Room F, according to Inspector Mohd Yusof, appeared to be used as a store-room – it had a bed, some prayer items and 'old-things'.

According to Inspector Mohd Yusof, during the search he was informed by one Inspector Sukmin, who had accompanied the police in the raid, that he had detained three persons who had tried to enter the premises. After the search he brought the accused, the other persons who had been arrested and the items seized from the accused to his office. He then handed over the seized items to PW1, Inspector Razali Goneng, the investigating officer of the case.

In the newspaper wrapper (P2) were four plastic packets (P3A to D) containing substances suspected to be heroin. In the purse (P6) were 24 straw tubes (P7A to X) also containing substances suspected to be heroin. The newspaper package and purse were found in the accused's right hand.

The plastic bag (P10) found in her left hand contained a 'glucolin' tin (P11), a weighing scale (P20) in a yellow container (P21), two bundles of empty straw tubes (P22A and B) and two bundles of empty plastic bags (P23A and B).

The 'glucolin' tin contained 25 small plastic packets (P12A to Y), ten straw tubes (P14A to J) and 58 short tubes ($P18^{1-58}$) in a plastic bag (P17), all containing substances suspected to be heroin.

The investigating officer of the case, PW1, who received the seized exhibits from Inspector Mohd Yusof, sent them to a government chemist for analysis. The report (P26) from the chemist showed that:

(1) the four plastic packets (P3A to D) in the newspaper wrapper (which was found in the accused's right hand) held a substance which contained 2g of heroin;
(2) the 24 plastic tubes (P7A to X) in the purse (which was also found in the accused's right hand) held a substance which contained 0.69g of heroin;
(3) the 25 plastic packets (P12A to Y) found in the 'glucolin' tin in a plastic bag (which was found in the accused's left hand) held a substance which contained 11.67g of heroin;
(4) the ten plastic straw tubes (P14A to J) (found in the 'glucolin' tin) held a substance containing 2.24g of heroin;
(5) the 58 short plastic tubes ($P18^{1-58}$) (found in a plastic packet in the 'glucolin' tin) held a substance containing 2.02g of heroin.

The total weight of the heroin found on the accused was therefore 18.62g of heroin, a drug listed in the First Schedule to the Dangerous Drugs Act 1952.

Before I deal with the question of whether the prosecution has made out a prima facie case of trafficking in heroin on the charge against the accused, it would be necessary to consider what the cross-examination of the prosecution witness revealed. The primary aim was to show that the prosecution's case was a fabricated one. In particular the cross-examination attempted to show:

(1) that the accused came out from her bedroom, room C, which was situated on the right of the room and not from F, the room on the left side;
(2) that when she saw PW1 she went back to room C to fetch her key;
(3) that there were other tenants in the premises at that time;
(4) that tenants from room F shouted to her not to open the door as 'they' (the people at the glass door) could be robbers;
(5) that as a result the accused stayed in her room and the police then broke open the glass door;
(6) that the police then went to the back portion of the premises and searched the place and the backyard;
(7) that a girl, Chong Siew Yoke, came out crying from a room.

All the above were put to Inspector Mohd Yusof and Detective Corporal Khabri. They denied all the allegations.

Inspector Mohd Yusof was adamant that he saw the accused come out from room F on the left side and he traced in the sketch plan the movement of the accused from room F to a point near the glass and from that point to a point Y near room E and then to point X. He said in reply to defence counsel, and this was the first time it was disclosed by him, that he saw the accused at point Y holding something. In reply to my question as to how he could see the accused in view of the dividing wall between room F and the glass door, Inspector Yusof replied that he saw the accused come out of room F through the open glass-paned louvres (a part of which can be seen from photograph P28B as being on the upper portion of the wall which is just about visible in the photograph). Inspector Mohd Yusof remarked that the door of room F was wrongly marked in the sketch plan (P27) by the investigating officer. He said this door faced the glass door (ie it faced the front of the premises) and this can be clearly seen from photograph P28C.

Inspector Mohd Yusof was also cross-examined about an apparent discrepancy between what he said in court he saw and what he had stated in the police report (P25). In his report he said:

> Apabila saya kenalkan diri saya polis perempuan Cina tersebut terus berlari kebahagian belakang *dan mengambil sesuatu.*

The impression given by the police report made by Inspector Mohd Yusof is that he saw her take something. In his evidence he said he did not see her take anything as he was concentrating on the door being broken. His explanation was that the report was lodged after the incident and it was made after he had discussed with Khabri as to what had happened and the report reflected the perception of others as to what took place. To my mind, on a prima facie basis, the explanation for the discrepancy appears satisfactory.

Inspector Mohd Yusof denied there were other tenants present in the house, or that he and his men went to the backyard of the house and searched the backyard. He also denied seeing a girl who came out from the room crying or that she was also brought to the police station.

Khabri, too, was adamant he saw the accused come out of room F and rush back into it after Inspector Mohd Yusof identified himself. He was adamant that he then saw her come out from the room and rush towards the back portion of the premises. He was also adamant he arrested her at the back portion of the premises which he identified as 'X' in the sketch plan. He said he pointed to the IO the place where the accused was arrested. He also said the IO had asked him a few questions as to where the accused had come from and where she had run to and he showed the IO these places. When he was confronted with the carbon copy of the sketch plan (D32) which had unerased marks in it indicating the path the accused allegedly took (according to the key to the sketch plan (both P27 and D32)) he said he did not know about D32 as it was the IO who prepared the plan. Khabri, however, agreed that at the back portion of the premises as shown in photograph P28D can be seen a rubbish chute. He agreed photograph P28E also showed the rubbish chute and he did not know why such photographs were taken (although he was there with the IO and the photographer) when the photographs were taken. And he agreed that not a single photograph of 'X' shown in the sketch P27 – showing the place where the accused was arrested, was taken. He then resiled from his earlier testimony that the accused was arrested at 'X' as shown in the sketch. He said the sketch plan was wrong and he pointed out the place of arrest as being near the rubbish chute. It is interesting to note that Inspector Yusof also referred, as was pointed out earlier, to 'X' in the sketch plan as the place where the accused was arrested.

Before I deal with the sketch plan which seemed to have caused a lot of confusion to everybody concerned in the trial, let me go back to Khabri.

Additional allegations were put to Khabri by the defence – that there was a tenant in room F who escaped through the back door and that in the backyard the police team recovered all the exhibits, that then the accused was called out from her room, the exhibits showed to her and one police personnel stated, 'Ini barang lu punya.' Khabri denied all these allegations.

I now come back to the sketch plan. As I had remarked earlier it was sloppily drawn up by the IO. The sketch appeared to be drawn to scale with various markings of measurement against some parts of the layout plan, but the IO, PW1, himself admitted these markings were merely estimates; in other words the plan was not to scale. He marked the dividing wall as having a wide width but it is clear from photograph P28B and the evidence of Inspector Mohd Yusof that the width was narrower. He marked the door of room F as facing room E but it is clear from photograph P28C and the evidence of Inspector Mohd Yusof that the door faced the front part of the premises. He failed to mark the position of the rubbish chute near where, Khabri subsequently said in evidence, the accused was arrested. Instead he marked 'X' at a point which was nearer to the kitchen, a point which could not be seen from the front part of the house, as the place where the accused was arrested. He stated in examination-in-chief that Khabri pointed out that place to him. Khabri at first said, as was pointed out earlier, that he pointed the place of arrest at 'X' but later he disputed this and said that the point was wrongly marked in the sketch. Khabri subsequently marked 'X1' in the sketch to show where he arrested the accused.

PW1, the IO, who had given his evidence as the first witness, was recalled and shown a carbon copy (D34) of the sketch plan (P27) which had been tendered in court and which had been supplied to defence counsel by the police. This carbon copy showed a line of 'X' marks leading, not from the left side room F, but from room C on the right to a point near the glass door A and from that point to the point marked 'X' at the back portion of the house near the kitchen. The sketch plan P27 produced by the prosecution showed the indentation of this line of 'X' marks though the marks themselves had been rubbed out; PW1 admitted he erased the line of 'X' marks on P27, and not on the carbon copy D34, one or two weeks after he had prepared the sketch. This was because after he completed his investigations he realized he had made a mistake on those markings. He said he had assumed that the accused came out from her bedroom C as he had found female clothing in the room and that she came out from this room and went to the door and tthen turned round and ran to the back. PW1 stated that he went to the premises on 15 January 1985, ie about three months after the accused was arrested, with Khabri. The photographs were taken on 11 February 1985. He said Khabri pinpointed various spots and he, PW1, instructed the photographer to take photographs of these places. He, however, denied that Khabri pointed out the movements of the woman as indicated by the line of 'X' marks. Khabri, on the other hand, said that PW1 had asked him where the woman came out from and where she went to.

My view is that the investigating officer did a very poor job of his investigations at the scene. He went to the scene about three months after the raid. And he caused photographs to be taken about four months after the raid. He put up a sloppy sketch plan as I had mentioned earlier and perhaps relied a lot on his memory to draw the plan. In fact he had put an original sketch from which he drew P27 but he said he could not trace the original sketch. In his evidence he stated that he did not put the line of 'X' marks on the original sketch and that when he drew up the sketch plan P27 (with carbon copy D32) he put these marks on his assumption that the accused came out from bedroom C. My preliminary view, subject to a review of the totality of the evidence after the defence has been heard, is that Khabri may have indicated to PW1 the room, room F, where Khabri said in court that the accused came from but PW1 may have misinterpreted what Khabri had told him and assumed, as he said he did, that the accused came from bedroom C because that was the accused's room and there was female clothing there; and that on that assumption marked the movements as originating from that room and ending at 'X'. The explanation that he erased the movement marks when he realized his mistake one or two weeks after investigations is in the circumstances plausible.

I am aware that features from hearsay should not be shown in a sketch plan (see *R* v *Lim Kang Chui*[1]). Unfortunately, police witnesses still persist in putting such features in a sketch plan which should only show permanent features visible to them. Courts in admitting such sketch plans as aids to better understand the testimony of witnesses allow identification of these additional features unless there are objections from defence counsel. In the present case the witnesses PW4 and PW5 gave their evidence as to the arrest of the accused near the kitchen and it was only subsequently that they pointed to the mark 'X' near the kitchen which had been put on by the IO, without objection from counsel. But as was pointed out, though Khabri said it was at mark 'X' during examination-in-chief, he corrected himself by saying the 'X' was wrongly marked.

The sketch plan P27 did not show at first glance the marks relating to the movement of the accused within the house but after D32 was shown to the court it became clear that such marks did appear on P27; they had been erased leaving corresponding indentation marks which were clearly visible on closer examination of these additional features when it became clear that Khabri had stated in evidence that he told PW1 where the accused had come from and had gone to. These features relate to facts connected to the facts in issue whether the accused was in possession of the heroin and had guilty knowledge of the heroin. These connected facts whether she walked from room F or room C, whether she went to the back portion after entering room F or she went back to room C are disputed and questions touching on what the two witnesses, the IO and Khabri, said to the other in regard to the pointing out of relevant places and movement of the accused and which relate to the additional features, are relevant to show the existence or non-existence of the collateral issues, whether she came out from her own bedroom or another room and whether she ran back to the other room to take incriminating heroin. These collateral issues are so inseparably connected with the facts in issue whether she was in possession of the heroin and whether she had guilty knowledge of the same and I allowed questions to be asked on the additional features in the sketch plan.

The cross-examination by defence counsel revealed several discrepancies as have been sketched out but I am satisfied that, on a prima facie basis, the discrepancies have arisen principally because of reliance on a sketch plan which is misleading in several aspects by Inspector Mohd Yusof and Khabri. The main thrust of their evidence is that the accused was found in possession of the heroin as is specified in the charge and that she ran away from the police when Inspector Mohd Yusof identified himself as a police officer carrying the incriminating objects which she took from a room. These primary facts are not inherently incredible. I would have to hear the defence rebuttal to re-evaluate the prosecution's case in the light of the totality of the evidence in the trial. In view of the fact that it is established on a prima facie basis that she had possession of the heroin, she is deemed to have known its nature under s 37(d) of the Dangerous Drugs Act 1952 and in view that the amount of heroin was 18.62g she is deemed to have trafficked in the drugs. She therefore has to rebut these presumptions.

Defence

The accused elected to give her evidence on oath and relied on a cautioned statement which she made shortly after her arrest on 9 October 1984. She did not call any witnesses.

Her defence was that the police had fabricated the prosecution's case against her; that the police feigned recovery of a red purse and a newspaper package which one of them said contained heroin from her blouse pocket; that the police recovered from outside the back premises a pink bag which one member of the police said contained heroin and accused her of being its owner. Her defence also included a claim that some third party or parties living in one of the rooms in the house had escaped through the back door of the house when the police raided the house and that the heroin was most probably theirs.

In her evidence the accused said at about 9.30pm she heard someone knock at the door. She was then sleeping in the second room (room C). She heard Ah

Yoke, who was in the first room studying, call her and say, 'Auntie, someone is knocking at the door. Can you go and find out who they are?' She (the accused) then went to the front door and lifted the curtain at the door and asked, 'Who are you looking for?' and the person who knocked at the door said, 'Police.' She was asked to unlock the door. She then walked back to her room to fetch the key.

As she walked back three or four steps she heard the voice of one of the occupiers of room 5 (ie room F) ask, 'Who were they looking for?' She said she replied they were the police. According to the accused, the occupier (she identified him later as Mah Kau Chye) told her not to open the door and said, 'Maybe they are robbers.'

As she was about to enter her room the person who knocked at the door broke the glass of the door. She then rushed to her room and stood there. She said they took five minutes to break open the door. After that she heard 'footsteps going in and out of the house'. And it was quiet again. She came out to look for Ah Yoke and shouted for her but there was no response.

She then heard somebody at the back call her to go to the back and switch on the light. She walked towards the back portion towards the two toilets. She said one of them had no lights. She saw three persons in the toilet where there were lights. They told her to switch on the lights at the back ('buka belakang api'). She replied there were no lights at the back ('belakang ta'da api'). Then she said they asked her for the key and she said she did not have it with her ('kunci saya tak angkat').

She said that two of the persons walked to her and wanted to search her person and she told them, 'You are male and I am a female. For what reason (do) you want to search me?' She said that then one of them slapped her twice, on both sides of the face, and one of them caught hold of both her hands. The person who slapped her face then put his hand into her blouse pocket and took it out and then opened his hand and said, 'Ini pek hoon lu punya poket angkat punya.'She said she replied, 'Gua poket takda pek hoon.' She said that as he showed his hand she saw a package wrapped in newspaper and a chocolate coloured purse. After that they handcuffed her.

She continued her evidence saying that as one of the persons guarded her the other walked towards a third person. Of the latter two one of them had a torchlight and the other a metal object. Then both of them 'opened the back door'. She said that she did not know how they managed to open the door. The two of them went through the back door and about two minutes later they came back to the house and one of them held a pinkish plastic bag. The two of them then squatted in the area near the toilet where there was light and 'opened up the plastic bag'. She said that then the person who guarded her walked towards the two and one of the three said, 'Ini betul pek hoon, cukuplah.' They then asked her, 'Rumah lu punya?' and she replied she was renting a room there. And the three then walked to her room where they seized three bank account books and two purses containing $1,600. (She said the two purses and the money were returned to her but not the account books.)

She also said that the police searched a room where two males and a female lived. She said she did not know whether they were in the room but the three were with the police beside her when the police searched the room. She said they were arrested by the police. After that they conducted a search in the fifth room (ie from F) and they came out with a yellow plastic bag from that room. She said room F was occupied by Mah Kau Chye and Ah Kuat. She also gave the names of the tenants in the other rooms.

She said that subsequently the four of them, herself and the three others who had been arrested, were taken to the police station. She also said she made a cautioned statement.

According to p 1 of the document containing the cautioned statement, it was made on 9 October 1984. The statement made by her after the caution was administered was barely one page. It substantially corroborated her evidence that while she was asleep she heard someone knocking at the door, that she went to the door and heard the police ask for the door to be opened, that she wanted to go and fetch the key when she heard voices from the end room telling her not to open the door as the person could be a robber and not the police, that she heard the glass of the door being broken, that she went inside her room, that she heard the police go to the back portion of the house, that the police called her to switch on the light at the back of the house, that the back had no light, that the police discovered a red bag at the back of the house and said the heroin (in the bag) belonged to her, that her room was searched and two purses and three bank account books were seized.

The cautioned statement omitted mentioning about Ah Yoke, about the names of the tenants in the house, about her being slapped by a police officer, about her allegation of the feigned recovery of a newspaper package and a purse from her blouse pocket, about the discovery of a yellow plastic bag in room F by the police, about the arrest of three other persons at the scene, all of which she claimed in her examination-in-chief. She said she mentioned a lot of things to the police but they were left out. She was not challenged on this.

As earlier stated, in her cautioned statement she related that she heard voices from the end room tell her not to open the door as the person (at the door) could be a robber and not the police. She also said that at that time

she heard the sound of someone opening the back door and running. In her examination-in-chief, however, she did not mention this. What she said was that she heard sounds of footsteps going in and out of the house. She said in reply to her counsel's question as to what had happened to the people at the end room, 'Don't know where they had gone. But I heard sounds of footsteps.'

In her examination-in-chief she said that after a police officer feigned recovery of the newspaper package and purse from her blouse pocket, two police officers went out of the back door and then about two minutes later they came back to the house and one of them showed her a pinkish plastic bag and said it was hers. She did not mention about her going or being brought through the back door to the back of the house. In her cautioned statement, however, she stated that the police brought her to the back of the house where the rubbish dump was and there she saw the police discover the plastic bag after which was was brought into the house.

I now come to her testimony on vital matters under cross-examination.

She was not cross-examined on her testimony that there was a fixed curtain hanging over the door, which curtain she lifted to see who was knocking at the door. She had said the curtain was a fixed one, not one that could slide (meaning that it was one that could not be undrawn).

She was cross-examined on that point of the cautioned statement where she stated she heard someone open the back door and run whereas she did not so state that in her examination-in-chief. Her reply was that she heard the sound when she was in the room; she said, 'I was in the room and I did not see – maybe I left it out – all I heard were sounds.' She said she did hear somebody open the door and she did not know what door it was. After she gave this evidence she was asked about the chronological sequence of some events to which I shall come to later and she appeared confused and told the interpreter that she had not taken anything since dinner the previous night. In connection with this I have to state that her evidence was given before lunch break on Saturday, 28 May 1988, and she did appear confused. I also have to state that the case was adjourned for further hearing on Tuesday, 31 May 1988 (Monday, 30 May 1988, being a holiday). When she gave evidence on Tuesday in the morning she again stated she had not taken breakfast that morning (ie that Tuesday) too. Her explanation was that breakfast was normally supplied at between 7.30 to 8am but the 'black maria' picked her up by 7.30am and went to fetch other prisoners, arriving in the court premises at 8.45am and by 8.50am she was sitting in the court. My court starts at 9am.

I can believe her testimony that on the two mornings she did not have breakfast, her last meal being dinner given the previous day of each of the said mornings. It is possible she became confused as to the sequence relating to some facts as a result of having had no breakfast on the first morning she gave evidence.

I now come back to the cautioned statement again. The cautioned statement was translated to her from Malay into Cantonese in court when defence asked her if she had made the statement, and when asked whether the contents were correct by the deputy public prosecutor (DPP) she said she could not remember what the interpreter had explained to her earlier that morning. It was re-translated to her and she said the contents were correct. Several portions of the cautioned statement were read out to her again by the DPP and these portions showed some omissions when compared with her testimony. Her reply was that the recording officer left out some details. She was also asked when in point of time she heard the noise of somebody opening the back door and run as stated in the cautioned statement and she said she heard the sound when she was in the room. It was put to her that what she told the court about hearing the sound of footsteps and of glass being broken was not true. To this she replied, 'I only heard the footsteps going in and out – I was in the room. I did not see anything.' To me it appeared she did not understand the question and I intervened and asked why she did not state in court in evidence that she had heard somebody open the door and escape. She replied, 'Because I was in the room – I did not see – maybe I left it out – all I heard were sounds.' She then said she heard somebody open a door but did not know which door.

She was then asked about the sequence of certain events as to which happened first – the police breaking the door, Mah speaking to her and 'the door being opened'. She said Mah telling her not to open the door was the first event. Then she went back to her room. Then she heard the sound of the glass panel (being broken). The interpreter asked her about the third incident and it was at that time that she appeared confused and said she had not taken anything since dinner the previous night. My view is that the question put by the DPP did confuse the accused. My impression was that she had misunderstood the question by the DPP relating to the 'door being opened'.

She was then asked if she went out of the house. She answered, 'No.' She then denied stating in her cautioned statement that the police brought her to the back of the house where there was a rubbish dump and that she saw the police discover a plastic bag and that subsequently she was brought back inside the house and while inside the house the police informed her that the 'thing' was heroin and that it was hers. She said she did not state that in her cautioned statement and she also said she could not remember what she had told the court. When she was reminded that she had confirmed that what was read

from the cautioned statement was correct, she said that in respect of what the interpreter had explained to her – some parts were correct and some she could not remember. She said except for the relevant passages relating to her being brought outside the back of the house the rest were true. She added that regarding her testimony that one of the policemen slapped her the recording officer of the cautioned statement told her she did not have to tell him that but to tell it in court. In re-examination, however, she said she forgot to mention in court what she had stated in the cautioned statement that she was brought back to the house.

In considering the defence I have to look at the totality of all the evidence, both of the prosecution and the defence, with the undoubted blemishes which have appeared therein.

The first matter that strikes me is about the 'glass door' at the premises. There is no dispute that the glass panel was transparent. But the accused stated that there was a curtain over this door and from her description it was placed within the premises and fixed and could not be drawn. It was a casual piece of evidence and it was left unchallenged. During the prosecution's case I had noticed from photograph P28A that the door, with the glass panel obviously replaced, appeared to be opaque but when I asked Inspector Mohd Yusof about it he said that the flash of the camera could have caused reflection on the glass. But then he was not the photographer. There appeared to be patterns on the glass or a curtain behind it and I allowed the DPP to ask him about that. Inspector Mohd Yusof said there was no curtain on that day. In the light of the accused's evidence, however, that she had lifted the curtain to see who was at the door, I re-scrutinized photograph P28A and it does appear from the photograph that there is an opacity with irregular patterns like the folds of a curtain from top to bottom; to the right of the glass between this opacity and the frame of the door is a thin line gap of glass showing that the opacity does not cover the door completely. To my mind there is indeed a curtain behind the door. I realize that the photograph was taken on the morning of 11 February 1985, some four months after the arrest of the accused. But it seems to me too obvious – it is a matter of common sense and experience – that privacy of one's premises is sought for by everybody especially at night and what more common place thing would one have for a door with a transparent glass panel to ensure such privacy than an ordinary curtain? So to my mind her evidence that there was a curtain hanging over the door is believable.

With that in mind, though not solely so, several matters of the prosecution's case which I said, before I called the accused to make her defence, would need re-evaluation in the light of the defence, would need to be re-stated and evaluated.

I am concerned about the evidence relating to the sketch plan. No reason was proferred as to why it was drawn up some three months after the arrest of the accused. The IO only visited the scene of the arrest on 15 January 1985. He visited the scene together with Khabri who had effected the arrest of the accused. Khabri had stated that he pointed to the IO, PW1, the place where the accused was arrested and he also showed the IO the place where the accused had come from and where she had run to. The IO himself said Khabri pinpointed various spots where photographs were taken (which curiously were taken about one month after the IO visited the scene) but denied that Khabri pointed out the movements of the accused. Could it be that Khabri never saw the woman's movements through the glass because there was a curtain hanging over the door? And was that why there were so many other unsatisfactory features in his evidence and the evidence of Inspector Yusof?

Now 'X' was marked near the kitchen in the sketch plan and this point 'X' was pointed out by Khabri and Inspector Mohd Yusof to have been the place where the accused was arrested. Why was no photograph taken of this place? Instead the photographs showed the rubbish chute, and the rubbish chute, it is in evidence, is near the two toilets. And it is the evidence of the accused that the police were near the toilet when they called her out of the room. Having confidently identified the point 'X' as the place of arrest, Inspector Mohd Yusof again confidently and clearly replied under cross-examination, 'I arrested her at the place marked 'X' in the sketch.' Khabri under cross-examination was asked, 'Who showed the point 'X'?' He replied, 'I brought Inspector Razali, the IO, to the scene and I pointed out the place where the accused was arrested.' However, when he was shown photographs P28B, C, D and E he had to agree that none of them showed the place marked 'X', the place where the accused was arrested. He then instead marked the place of arrest in P28C which shows the corridor leading to the rubbish chute, not the kitchen. And he said, 'Sketch plan is wrong – from the front door one can see directly to the place wwhere the accused was arrested.' I ffind these discrepancies in the light of the defence ttrouubling.

I have re-scrutinized the police report (P25) made by Inspector Yusof in respect of the arrest. In the report he stated that he together with a police party raided premises No 71, Jalan Berangan. He stated in his report:

> Saya telah mengetuk pintu dan dihampiri oleh seorang perempuan cina. Apabila saya kenalkan diri saya polis perempuan cina tersebut terus belari kebahagian belakang dan mengambil sesuatu. Saya mengarahkan DPC 63205 untuk memecahkan pintu cermin rumah itu dan mengejar perempuan cina itu.

According to the above he had seen the woman run to the back and pick something and then he directed DPC

63025 to break the glass panel on the door after which he chased the woman. It will be noted that no mention was made of the woman coming out of a room or of her going back to the same room – only that she picked something. His evidence in court was that when he knocked at the door he saw the accused come out of room F and approach the door and when he identified himself as the police she turned back and ran towards the back portion of the house. It was Khabri who said that while the glass was being broken he kept the woman under observation and he saw her go to room F and come out with something in her hand. Inspector Mohd Yusof's explanation for his report where it is made to appear that he observed the woman run to the back and pick something up and then only he ordered the glass panel to be broken down was that the report was a composite report of what he and others observed. But in the light of the defence was it really a composite report? If it was really such a composite report then why is the sequence of events not in accordance with the testimony of himself and Khabri. It was only after the woman had run to the back and picked up something that he ordered DPC 63025 to break open the glass panel, according to the police report. But Khabri said that while the glass panel was being broken he observed the accused run to room F and then go out with something in her hand. After re-scrutiny of the police report and the evidence on the same matter, I find I do need to be cautious not only with this aspect of the evidence but the whole of the evidence bearing in mind too that the evidence of the accused was that she came out of her bedroom, room C, went to the door, lifted the curtain to the door and went back to the room to fetch the key when she was told by May not to open the door whereupon the police broke the glass panel. I have to bear in mind that the IO did not indicate in the sketch plan the movement of the accused as originating from room F but as originating from indeed her own bedroom, room C. And Khabri's evidence was that he told the IO the movements of the woman. It is true the IO did not mark her as going back to her bedroom but as going straight to the back. But does not the police report say she ran to the back portion of the premises, there being no mention of her going to a room in a supposedly composite police report?

I also find it strange that there was a photograph showing the inside of the bedroom of the accused but no photograph of the inside of room F where the accused had allegedly entered and taken the drugs.

The accused's story that the police discovered the red bags outside the premises at the back must also be seen in the light of the sketch plan. Curiously, the sketch plan shows dotted lines indicating the backyard of the house and the length and width of this backyard are indicated as 14 ft and 6 or 7 ft respectively. Although the plan was not to scale, why was the backyard marked and marked with their approximate measurements? Was it because he had been informed of the importance of the backyard? Was not the red bag containing heroin really found there?

One other aspect. As the IO, PW1 must have read the cautioned statement of the accused and realized that the accused had stated that there were tenants in room F, that the voice telling the woman not to open this door came from this room. In her evidence the accused said that the tenants of this room were Mah Kau Chye and Ah Kuat. Her evidence was that Mah Kau Chye told her not to open the door. There was no evidence that PW1 contacted the landlord to find out about these two persons. In any event nobody came to give evidence as to whether the room was not occupied by anybody. There was only the opinion of Inspector Mohd Yusof that it was a store but he said there was a bed there. If indeed two persons were occupying the room would the accused have come out of that room which was not hers?

Could it be that indeed there was a Mah Kau Chye and an Ah Kuat who occupied room F, that Mah told the accused not to open the door, that they escaped through the back, that they carried the red plastic bag, the newspaper package and purse containing heroin, that the newspaper package and purse were dropped, because of the rush to escape, inside the premises at the back, that the red plastic bag was abandoned at the back outside the premises? There is discrepancy in the accused's evidence vis-à-vis her cautioned statement about whether she was brought outside the premises – that is about the only serious discrepancy – but she said she was confused and she did appear confused as I have earlier stated – could it be true that the red bag was found outside and that the purse and newspaper package being discovered inside were pinned on her? Inspector Mohd Yusof said that the back door was locked but why did the IO pay great attention to the backyard? It was after all Khabri the arresting officer who accompanied him to the scene and he could have indicated to him that the backyard was important enough to be included in the sketch plan with all those measurements as to its length and width.

To sum up. The investigations in this case have been most unsatisfactorily conducted and the DPP indeed conceded that the investigations by the IO were not up to the mark. The blemishes in the prosecution's case have become accentuated, and more blemishes have been revealed, in the light of the totality of the evidence. The evidence of PW4 and PW5 with their inherent inconsistencies and their inconsistencies when viewed against the police report, the sketch plan, the evidence of the IO and the defence leave me in a state of doubt as to what actually took place that night. The cardinal principle enshrined in the law of our country is that the onus of proving guilt of an accused is throughout on the prosecution and if upon the whole evidence the court is left in a

real state of doubt, the prosecution has failed to satisfy the onus of proof which is upon it (see *Mat* v *PP* [2]). To my mind, the accused has succeeded in raising a reasonable doubt on the prosecution's story that she was in possession of the drugs. In the event, I do not have to consider the rebuttable presumptions raised under s 37(d) and (da) of the Dangerous Drugs Act 1952. Accordingly, I acquit her of the charge.

Order accordingly.

Solicitors: *Khairuddin & Associates.*

Reported by *PS Ranjan*

Public Prosecutor v Kamde bin Raspani

HIGH COURT (JOHORE BAHRU) – CRIMINAL TRIAL NO 17 OF 1984
ZAKARIA YATIM J
10 APRIL 1988

Criminal Procedure – Cautioned statements – Admissibility – Caution ambiguous in meaning – Recording of statements – Use of interpreter – Exact words of accused not recorded – Statements not interpreted to him after recording – Voluntariness of statements – Accused interrogated for long hours at night in breach of rules – Allegation by accused of assault of police – Burden on prosecution at close of case – Prima facie case

Evidence – Cautioned statements – Admissibility – Caution ambiguous in meaning – Recording of statements – Use of interpreter – Exact words of accused not recorded – Statements not interpreted to him after recording – Voluntariness of statements – Accused interrogated for long hours at night in breach of rules – Allegation by accused of assault by police – Evidence of accomplice – Need for corroboration – Circumstantial evidence

The accused was charged under the Dangerous Drugs Act 1952 with the offence of cultivating cannabis. The prosecution relied largely on two cautioned statements made by the accused and the evidence of one Sumari bin Saribu (PW11) who had been arrested near the scene of the crime. In his evidence, Sumari had named the accused.

The defence objected to the admissibility of the cautioned statements. The police inspector who administered the caution admitted that in the caution he administered, which was translated into simple Malay, there was no comma after the word 'tidak'. The inspector had experienced difficulty in understanding the accused because of the accused's Javanese accent and so he called another inspector to act as interpreter. The statements were recorded in Malay. The recording officer also admitted that he had recorded the words of the interpreter and not the words of the accused. He had read back the statements to the accused but they were not interpreted to the accused.

In addition, the accused had been subjected to long hours of interrogation. He was once interrogated for 17½ hours until the early hours of the morning in breach of the Police (Lock Up) Rules 1953 which provides that prisoners shall be locked up for the night by 6.30 pm and shall rise and be dressed by 6.30 am. The accused had also alleged that he had been beaten during interrogation and that he had fabricated his statement to avoid further beating. The police witnesses admitted that there was opportunity to beat the accused. Sumari too alleged that he had been assaulted by the police after his arrest and that the police had uttered threats to him.

Held, acquitting and discharging the accused: (1) For the statements to be admissible, the prosecution must prove beyond reasonable doubt that the statements were made voluntarily without any inducement, threat or promise. It is the duty of the prosecution to prove affirmatively to the satisfaction of the court that the statements were made voluntarily and not obtained by any improper means.

(2) Without the comma, the caution could mean two things. It could mean that what the accused said could be used in evidence or that it could not be used in evidence against him. Therefore, the caution itself was very ambiguous, especially so when the caution had to be translated into simple Malay for the accused.

(3) It was doubtful whether the statements were recorded in a proper manner. The words in the cautioned statements were not the words of the accused. Furthermore, the statements were not interpreted back to him. For this reason, the cautioned statements were inadmissible.

(4) The way the accused was interrogated was indeed unfair and the court must regard it as oppressive. In addition, there was a strong probability that the accused was assaulted after which he agreed to make a statement. The court had no hesitation in coming to the conclusion that the accused was put under tremendous physical and mental pressure in order to compel him to make the statements. The statements were inadmissible because the court was fully satisfied that the statements were not made voluntarily. The court was also satisfied that the statements were not made without coercion or threat.

(5) When the prosecution closed their case, there was no evidence at all to link the accused with the cultivation of the plants or with the exhibits. The only evidence was the evidence of Sumari. Assuming that he was not under pressure to give the evidence, he had been found and arrested at the scene and was therefore an accomplice and his evidence was not corroborated by anyone in the sense that the plants belonged to the accused or the plants were cultivated by the accused. Neither was there circumstantial evidence which pointed to the guilt of the accused.

(6) The prosecution, at the close of their case, need not prove their case beyond reasonable doubt. All that they needed to show was that there was some credible evidence to link the accused with the offence with which he was charged. There must be some evidence which is not inherently incredible. In this case, there was no evidence at all to link the accused with the cultivation of the plants or with the exhibits. There was therefore no prima facie case against the accused.

Cases referred to

1 *Dato Mokhtar bin Hashim* v *PP* [1983] 2 MLJ 232 (folld)
2 *PP* v *Singaran* Kedah Criminal Trial No 11 of 1974 (unreported) (folld)
3 *PP* v *Seman bin Misbah* Criminal Trial 4 of 1983 (unreported) (folld)
4 *PP* v *Akin Khan bin Abdul Khanan* [1987] 2 CLJ 244 (folld)
5 *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 (folld)